

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**NATIONAL LABOR RELATIONS BOARD, ON BEHALF
OF ALLWAYS EAST TRANSPORTATION, INC.**

Applicant

**CIVIL NO. __-CV-_____
J. _____
ECF CASE**

vs.

**NATIONAL EXPRESS CORP., d/b/a DURHAM
SCHOOL SERVICES**

Respondent

**APPLICATION FOR ORDER ENFORCING
ADMINISTRATIVE SUBPOENA DUCES TECUM**

To the Honorable Judges of the United States District Court for the Southern District of New York:

The National Labor Relations Board ("Board"), an administrative agency of the Federal Government, created pursuant to the National Labor Relations Act ("Act"), as amended (29 U.S.C. § 151 et seq.), respectfully applies to this honorable court, at the request and on behalf of Allways East Transportation, Inc., ("Allways East") pursuant to Section 11(2) of the Act (29 U.S.C. § 161(2)), for an order requiring National Express Corp., d/b/a Durham School Services ("Durham School Services"), to comply with a subpoena duces tecum issued by Allways East, and duly served on Durham School Services in the manner provided by law. In support of this application, the Board respectfully shows as follows:

1. This Court has jurisdiction over the subject matter of this proceeding and of Durham School Services, by virtue of Section 11(2) of the Act. The Board's administrative

hearing, in which Durham School Services was subpoenaed to produce documents, is being carried on in Poughkeepsie, New York, a location within this judicial district.

2. Pursuant to the provisions of Section 6 of the Act, the Board has issued Rules and Regulations ("Rules"), governing the conduct of its operations, which Rules have been duly published in the Federal Register (24 F.R. 9095), as provided for in the Administrative Procedures Act (5 U.S.C. § 552). This court may take judicial notice of the Rules by virtue of 44 U.S.C. § 1507.

3. This application arises as a result of events in unfair labor practice charges currently pending before the Board pursuant to Section 10(b) of the Act (28 U.S.C. § 160(b)). The charges are Allways East Transportation, Inc. and International Brotherhood of Teamsters, Local 445, Case 03-CA-128669 and Case 03-CA-133846. Attached as Exhibit 1 are true and correct copies of the charges in this matter.

4. After the charges were investigated by Region 3 of the Board, the Regional Director of Region 3 issued a consolidated complaint and notice of hearing on September 30, 2014, alleging that Allways East has been engaging in, and continues to engage in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act (29 U.S.C. § 158(a)(1) and (5)). Among other things, the consolidated complaint alleges that Allways East has been unlawfully refusing to recognize and bargain with the International Brotherhood of Teamsters, Local 445.

5. Charges 03-CA-128669 and 03-CA-133846 were consolidated in order to reduce trial time and expense. Allways East filed an answer and amended answer to the consolidated complaint denying that it violated the Act. Copies of the consolidated complaint, answer, and amended answer are attached as Exhibit 2. The charges, consolidated complaint, answer, and amended answer were prepared, filed and served consistent with the requirements of Section

10(b) of the Act and of 29 C.F.R. Sections 102.9, 102.10, 102.15 and 102.20 of the Board's Rules. In relation to the charges and consolidated complaint described in paragraphs 3 and 4 above, Allways East requested and received a subpoena duces tecum from the Board. On December 1, 2014, Allways East issued subpoena duces tecum B-720475 ("the subpoena") directing Durham School Services's Custodian of Records, to appear at the hearing before an administrative law judge of the Board at 1:00 p.m. on December 15, 2014 at the Poughkeepsie Municipal Building, 62 Civic Center Plaza, Common Council Chambers, Third Floor, Poughkeepsie, New York, the time and location of the Board's administrative hearing, and to then and there provide documents as requested in the subpoena. True and correct copies of the subpoena and mail receipt are attached as Exhibit 3.

6. The issuance of the subpoena described above in paragraph 5 is consistent with the requirements of Section 11(1) of the Act and Section 102.31 of the Rules. The subpoena was duly served on Durham School Services on December 1, 2014. Service complied with Section 11(4) of the Act (29 U.S.C. § 161(4)) and Section 102.114 of the Rules.

7. On December 15, 2014, a hearing on the consolidated complaint described above in paragraph 4 commenced before the Honorable Susan A. Flynn, an administrative law judge of the Board, at Poughkeepsie, New York. Durham School Services did not appear at the hearing, did not provide any documents at the hearing, and did not file a petition to revoke the subpoena duces tecum.

8. On December 16, 2014, Allways East submitted to Counsel for the General Counsel ("General Counsel") of the National Labor Relations Board a written request that the Board institute subpoena enforcement proceedings in this Court pursuant to Section 102.31(d) of the Rules. The written request is attached as Exhibit 4.

9. On December 16, 2014, Administrative Law Judge Flynn adjourned the hearing pending compliance with the the outstanding subpoena matter, which is now before this Court. General Counsel was informed that Durham School Services was complying with the subpoena, however full compliance has not been achieved.

10. To date, to the knowledge and belief of the General Counsel, Durham School Services has purportedly provided documents to Allways East, or indicated to Allways East that no such documents exist, with regards to paragraphs 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, and 18 of the subpoena. Paragraphs 4 and 16 have not been responded to as of the time of this filing.

11. Respondent's refusal to produce the subpoenaed documents, which Allways East asserts are relevant to the issues in the proceeding before the Board, constitutes contumacious conduct within the meaning of Section 11(2).

WHEREFORE, the Applicant, the National Labor Relations Board, at the request of and on behalf of Allways East, respectfully requests:

1. That an order to show cause issue directing Durham School Services to appear before this Court on a date specified in the order and to show cause why an order should not issue directing Durham School Services to fully comply with Allways East's subpoena duces tecum;


2. After considering arguments in response to the order to show cause, that this Court issue an order requiring Durham School Services to appear before Judge Flynn, at a time and place to be fixed by Judge Flynn, and to produce documents fully responsive to Allways East's subpoena; and

3. That the Court grant such other relief as may be necessary and appropriate.

DATED at Albany, New York this 26th day of January, 2015.

National Labor Relations Board

By: Richard F. Griffin, Jr., General Counsel
Mary E. Mattimore, Regional Attorney



JOHN J. GRUNERT, Counsel for Applicant
National Labor Relations Board – Region 3
Albany Resident Office
Leo W. O'Brien Federal Building
11A Clinton Avenue, Room 342
Albany, New York 12207
(518) 431-4159
SDNY Bar Code: JG1004

EXHIBIT 1

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INTERNET
FORM NLRB-501
(2-09)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C. 3512

DO NOT WRITE IN THIS SPACE

Case 03-CA-128669	Date Filed 5/15/2014
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INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer Allways East Transportation, Inc	b. Tel. No. (914) 985-6776
	c. Cell No.
	f. Fax No.
d. Address (Street, city, state, and ZIP code) 228 Myers Corners Road Wappingers Falls, NY 12590	e. Employer Representative Marlaina Koller
	g. e-Mail jemgulf@aol.com
	h. Number of workers employed
i. Type of Establishment (factory, mine, wholesaler, etc.) Transportation	j. Identify principal product or service School Bus Transportation
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (first subsections) 8(a)5 _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) On or about March 10 and continuing, the above mentioned company has violated the ACT by refusing to bargain in good faith.	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) Lori Polesel	
4a. Address (Street and number, city, state, and ZIP code) 15 Stone Castle Road Rock Tavern, NY 12575	4b. Tel. No. 845-564-5297 x131
	4c. Cell No. 845-857-7931
	4d. Fax No. 845-564-4120
	4e. e-Mail lori445@hvc.rr.com
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) International Brotherhood of Teamsters Local 445	
6. DECLARATION: I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief. By <u>Lori Polesel</u> <u>LORI POLESEL</u> (signature of representative or person making charge) (Print/type name and title or office, if any) Address _____ 5/14/14 (date)	
Tel. No.	
Office, if any, Cell No.	
Fax No.	
e-Mail	

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

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INTERNET
FORM NLRB-501
(2-08)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C. 3512

DO NOT WRITE IN THIS SPACE

Case
03-CA-133846Date Filed
8/1/2014

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer Allways East Transportation, Inc		b. Tel. No. 914-965-6776
		c. Cell No.
		f. Fax No.
d. Address (Street, city, state, and ZIP code) 228 Myers Corners Road Wappingers Falls, NY 12690	e. Employer Representative Marlaina Kollar	g. e-Mail jemgulf@aol.com
		h. Number of workers employed

i. Type of Establishment (factory, mine, wholesaler, etc.)
Transportationj. Identify principal product or service
School Bus Transportation

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

On or about July 18 and continuing, the above mentioned company has violated the Act by (1) refusing to meet with the Union concerning a terminated employee, and (2) failing to provide information requested by the Union which it needed to fulfill its obligations as the bargaining agent.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

Lori Polese

4a. Address (Street and number, city, state, and ZIP code)

15 Stone Castle Road
Rock Tavern, NY 12575

4b. Tel. No. 845-564-5297 x131

4c. Cell No. 845-857-7931

4d. Fax No. 845-564-4120

4e. e-Mail
lori445@hvc.rr.com

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)
International Brotherhood of Teamsters Local 445

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By

Lori Polese

(signature of representative or person making charge)

LORI POLESE

(Print/Type name and title or office, if any)

Tel. No.

Office, if any, Cell No.

Fax No.

e-Mail

Address

7/30/14
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

EXHIBIT 2

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3**

ALLWAYS EAST TRANSPORTATION, INC.

and

**Cases 03-CA-128669
03-CA-133846**

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 445**

**ORDER CONSOLIDATING CASES, CONSOLIDATED
COMPLAINT AND NOTICE OF HEARING**

Pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board (Board), and to avoid unnecessary costs or delay, IT IS ORDERED THAT Case 03-CA-128669 and Case 03-CA-133846, which are based on charges filed by International Brotherhood of Teamsters, Local 445 (Union) against Allways East Transportation, Inc. (Respondent), are consolidated.

This Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, which is based on these charges, is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act) and Section 102.15 of the Board's Rules and Regulations, and alleges that Respondent has violated the Act as described below:

I

(a) The charge in Case 03-CA-128669 was filed by the Union on May 15, 2014, and a copy was served on Respondent by U.S. mail on the same date.

(b) The charge in Case 03-CA-133846 was filed by the Union on August 1, 2014, and a copy was served on Respondent by U.S. mail on the same date.

II

(a) At all material times, Respondent, a corporation with an office and place of business located at 228 Myers Corners Road, Wappingers Falls, New York (Respondent's Wappingers Falls facility), has been engaged in providing bus transportation to pre-school and special education students.

(b) During the past twelve months, Respondent, in conducting its business operations described above in paragraph II(a), derived gross revenues in excess of \$250,000 and purchased and received at its Wappingers Falls facility products, goods, and materials valued in excess of \$5,000 directly from points outside the State of New York.

III

At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

IV

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

V

(a) At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Judy Koller	—	President
Marlaina Koller	—	Vice President

(b) At all material times, the following individuals held the positions set forth opposite their respective names and have been agents of Respondent within the meaning of Section 2(13) of the Act:

Aldo Leon	—	Dispatcher
Carlos Rivera	—	Dispatcher

VI

(a) The following employees of Durham School Services (Durham Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers and monitors employed by the Employer at its 10-14 Tucker Drive, Poughkeepsie, New York and Middle Road, Red Hook, New York locations; excluding office clerical employees, dispatchers, assistant dispatchers, safety trainers, mechanics, guards, and supervisors and professional employees as defined in the Act.

(b) At all material times until about April 22, 2014, the Union had been the exclusive collective-bargaining representative of the Unit employed by Durham School Services, and during that time the Union had been recognized as such representative by Durham School Services. This recognition had been embodied in successive collective-bargaining agreements, the most recent of which was effective from September 2, 2012 to August 31, 2018.

(c) At all material times until about April 22, 2014, based on Section 9(a) of the Act, the Union had been the exclusive collective-bargaining representative of the Unit employed by Durham School Services.

VII

(a) About February 28, 2014, Respondent entered into a contract with Dutchess County (N.Y.) to transport pre-school and special education students formerly transported by

Durham School Services, and since April 22, 2014 has continued to operate, at its Wappingers Falls facility, that portion of Durham School Services' business in basically unchanged form, and has employed as a majority of its employees at its Wappingers Falls facility, individuals who were previously employees of Durham School Services.

(b) Based on the operations described above in paragraph VII (a) Respondent has continued the employing entity and is a successor to Durham School Services.

VIII

(a) The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers and monitors employed by Respondent at its 228 Myers Corners Road, Wappingers Falls, New York location; excluding office clerical employees, dispatchers, assistant dispatchers, safety trainers, mechanics, guards, and supervisors and professional employees as defined in the Act.

(b) At all times since about April 22, 2014, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of Respondent's employees in the Unit.

IX

(a) About April 16, 2014, the Union, by letter, requested that Respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

(b) Since about April 22, 2014, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

X

(a) About April 22, 2014, Respondent unilaterally changed the wage rates paid to employees in the Unit.

(b) The subject set forth above in paragraph X (a) relates to wages, hours, and other terms and conditions of employment of the Unit and is a mandatory subject for the purposes of collective bargaining.

(c) Respondent engaged in the conduct described above in paragraph X (a) without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct.

XI

(a) About May 1, 2014, Respondent, by Aldo Leon and Carlos Rivera, discharged its employee Sherry Siebert.

(b) Respondent exercised discretion in imposing the discipline described above in paragraph XI (a).

(c) The subjects set forth above in paragraph XI (a) and (b) relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

(d) Respondent engaged in the conduct described above in paragraph XI (a) and (b) without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct.

XII

(a) Since about July 18, 2014, the Union, by e-mail, has requested that Respondent furnish the Union with the following information: names of any and all former Durham employees that have been terminated.

(b) The information requested by the Union, as described above in paragraph XII (a) is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(c) Since about July 18, 2014, Respondent has failed and refused to furnish the Union with the information requested by it as described above in paragraph XII (a).

XIII

By the conduct described above in paragraphs IX (b), X (a) and (c), XI (a), (b) and (d), and XII (c), Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

XIV

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for the unfair labor practice alleged above in paragraphs X and XI, the General Counsel seeks an Order requiring Respondent, inter alia, to preserve and, within 14 days of a request, provide at the office designated by the Board or its agents, a copy of all payroll records, social security payroll records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in

electronic form, necessary to analyze the amount of backpay due under the terms of such Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

WHEREFORE, the General Counsel further seeks, as part of the remedy for the unfair labor practices alleged above in paragraphs X and XI, an Order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no unfair labor practice.

WHEREFORE, the General Counsel further seeks, as part of the remedy for the allegations in paragraphs X and XI, that Respondent be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the Consolidated Complaint. The answer must be **received by this office on or before October 14, 2014, or postmarked on or before October 13, 2014.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that

the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on November 17, 2014 at 1:00 p.m., in the Hearing Room at the Leo W. O'Brien Federal Building, 11 A Clinton Avenue, Suite 342, Albany New York, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this Consolidated Complaint. The procedures to be followed at the hearing are

described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Buffalo, New York this 30th day of September, 2014.

/S/RHONDA P. LEY

RHONDA P. LEY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 03
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

Attachments

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 3

-----X
ALLWAYS EAST TRANSPORTATION, INC.

Respondent,

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 445,

Union.
-----X

Case Nos. 03-CA-128669
03-CA-133841

ANSWER

ALLWAYS EAST TRANSPORTATION, INC. ("AETI" and/or "Respondent"), by and through their counsel, Marshall M. Miller Associates, Inc., submits this Answer to the Complaint by the National Labor Relations Board, as follows:

I(a). Respondent denies possessing knowledge or information sufficient to respond to Paragraph I(a) of the Complaint.

I(b). Respondent denies possessing knowledge or information sufficient to respond to Paragraph I(b) of the Complaint.

II(a). Respondent admits the allegations set forth in Paragraph II(a) of the Complaint.

II(b). Respondent admits the allegations set forth in Paragraph II(b) of the Complaint.

III. Respondent admits the allegations set forth in Paragraph III of the Complaint.

IV. Respondent denies possessing knowledge or information sufficient to respond to Paragraph IV of the Complaint.

V(a). Respondent admits the allegations set forth in Paragraph V(a) of the Complaint.

V(b). Respondent denies the allegations set forth in Paragraph V(b) of the Complaint.

VI(a). Respondent denies the allegations set forth in Paragraph VI(a) of the Complaint.

VI(b). Respondent denies the allegations set forth in Paragraph VI(b) of the Complaint.

VI(c). Respondent denies the allegations set forth in Paragraph VI(c) of the Complaint.

VII(a). Respondent denies the allegations set forth in Paragraph VII(a) of the Complaint.

- VII(b). Respondent denies the allegations set forth in Paragraph VII(b) of the Complaint.
- VIII(a). Respondent denies the allegations set forth in Paragraph VIII(a) of the Complaint.
- VIII(b). Respondent denies the allegations set forth in Paragraph VIII(b) of the Complaint.
- IX(a). Respondent admits the allegations set forth in Paragraph IX(a) of the Complaint.
- IX(b). Respondent admits the allegations set forth in Paragraph IX(b) of the Complaint.
- X(a). Respondent denies the allegations set forth in Paragraph X(a) of the Complaint.
- X(b). Respondent denies the allegations set forth in Paragraph X(b) of the Complaint.
- X(c). Respondent denies the allegations set forth in Paragraph X(c) of the Complaint.
- XI(a). Respondent denies the allegations set forth in Paragraph XI(a) of the Complaint.
- XI(b). Respondent denies the allegations set forth in Paragraph XI(b) of the Complaint.
- XI(c). Respondent denies the allegations set forth in Paragraph XI(c) of the Complaint.
- XI(d). Respondent admits the allegations set forth in Paragraph XI(d) of the Complaint.
- XII(a). Respondent denies the allegations set forth in Paragraph XII(a) of the Complaint.
- XII(b). Respondent denies the allegations set forth in Paragraph XII(b) of the Complaint.
- XII(c). Respondent denies the allegations set forth in Paragraph XII(c) of the Complaint.
- XIII. Respondent denies the allegations set forth in Paragraph XIII of the Complaint.
- XIV. Respondent denies the allegations set forth in Paragraph IV of the Complaint.

AFFIRMATIVE DEFENSES

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

- XV. The Complaint fails to state any ground upon which relief may be granted under the National Labor Relations Act.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

- XVI. The Respondent is not a successor employer.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

- XVII. The Respondent has no obligation to bargain with the Union.

XVIII. The Union is not the collective bargaining representative of any of the employees of the Respondent.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

XIX. The National Labor Relations Act does not permit the imposition of the requested relief.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

XX. The NLRB has acted arbitrarily and capriciously in the investigation of the underlying unfair labor practice charges.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

XXI. All actions taken by Respondents were taken in good faith and for legitimate non-discriminatory reasons.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

XXII. Respondents are entitled to relief under the EAJA.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

XXIII. The General Counsel cannot establish the required evidentiary showings under *Wright Line*, 251 NLRB 1083 (1980), *end. on other grounds* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983), *Wright Line*.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

XXIV. The Complaint should be dismissed as it does not effectuate the purposes and policies of the NLRA and there is no remedy for the alleged actions alleged in the Complaint.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

XXV. The Complaint is barred by Section 10(b) of the NLRA, as the charges that are the basis of the Complaint are outside the six-month limitations period.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE

XXVI. The Respondent did not violate the NLRA by unilaterally changing employees' terms and conditions of employment.

XXVII. The Union does not represent a majority of the employees in the unit.

WHEREFORE, for all of the reasons set forth above, Respondent respectfully demands that the Complaint, and each and every part thereof, be dismissed in its entirety.

Dated: Lake Success, NY
October 14, 2014

MARSHALL M. MILLER ASSOCIATES, INC.

/s/

Richard I. Milman, Esq.
Ira D. Wincott, Esq.
Attorneys for Respondent
3000 Marcus Avenue, Suite 3W8
Lake Success, New York 11042
(516) 328-8899
(516) 328-0082

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 3

-----X
ALLWAYS EAST TRANSPORTATION, INC.

Respondent,

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 445,

Union.
-----X

Case Nos. 03-CA-128669
03-CA-133846

AMENDED ANSWER

ALLWAYS EAST TRANSPORTATION, INC. ("AETI" and/or "Respondent"), by and through their counsel, Marshall M. Miller Associates, Inc., submits this Answer to the Complaint by the National Labor Relations Board, as follows:

I(a). Respondent denies possessing knowledge or information sufficient to respond to Paragraph I(a) of the Complaint.

I(b). Respondent denies possessing knowledge or information sufficient to respond to Paragraph I(b) of the Complaint.

II(a). Respondent admits the allegations set forth in Paragraph II(a) of the Complaint.

II(b). Respondent admits the allegations set forth in Paragraph II(b) of the Complaint.

III. Respondent admits the allegations set forth in Paragraph III of the Complaint.

IV. Respondent denies possessing knowledge or information sufficient to respond to Paragraph IV of the Complaint.

V(a). Respondent admits the allegations set forth in Paragraph V(a) of the Complaint.

V(b). Respondent denies the allegations set forth in Paragraph V(b) of the Complaint and refers questions of law except admits Leon and Rivera are dispatchers..

VI(a). Respondent denies the allegations set forth in Paragraph VI(a) of the Complaint.

VI(b). Respondent denies the allegations set forth in Paragraph VI(b) of the Complaint.

VI(c). Respondent denies the allegations set forth in Paragraph VI(c) of the Complaint.

- VII(a). Respondent denies the allegations set forth in Paragraph VII(a) of the Complaint.
- VII(b). Respondent denies the allegations set forth in Paragraph VII(b) of the Complaint.
- VIII(a). Respondent denies the allegations set forth in Paragraph VIII(a) of the Complaint.
- VIII(b). Respondent denies the allegations set forth in Paragraph VIII(b) of the Complaint.
- IX(a). Respondent admits the allegations set forth in Paragraph IX(a) of the Complaint.
- IX(b). Respondent admits the allegations set forth in Paragraph IX(b) of the Complaint.
- X(a). Respondent denies the allegations set forth in Paragraph X(a) of the Complaint.
- X(b). Respondent denies the allegations set forth in Paragraph X(b) of the Complaint.
- X(c). Respondent denies the allegations set forth in Paragraph X(c) of the Complaint.
- XI(a). Respondent denies the allegations set forth in Paragraph XI(a) of the Complaint.
- XI(b). Respondent denies the allegations set forth in Paragraph XI(b) of the Complaint.
- XI(c). Respondent denies the allegations set forth in Paragraph XI(c) of the Complaint.
- XI(d). Respondent admits the allegations set forth in Paragraph XI(d) of the Complaint.
- XII(a). Respondent denies the allegations set forth in Paragraph XII(a) of the Complaint.
- XII(b). Respondent denies the allegations set forth in Paragraph XII(b) of the Complaint.
- XII(c). Respondent denies the allegations set forth in Paragraph XII(c) of the Complaint.
- XIII. Respondent denies the allegations set forth in Paragraph XIII of the Complaint.
- XIV. Respondent denies the allegations set forth in Paragraph XIV of the Complaint.

AFFIRMATIVE DEFENSES

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

- XV. The Complaint fails to state any ground upon which relief may be granted under the National Labor Relations Act.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

- XVI. The Respondent is not a successor employer.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

- XVII. The Respondent has no obligation to bargain with the Union.

XVIII. The Union is not the collective bargaining representative of any of the employees of the Respondent.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

XIX. The National Labor Relations Act does not permit the imposition of the requested relief.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

XX. The NLRB has acted arbitrarily and capriciously in the investigation of the underlying unfair labor practice charges.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

XXI. All actions taken by Respondents were taken in good faith and for legitimate non-discriminatory reasons.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

XXII. Respondents are entitled to relief under the EAJA.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

XXIII. The General Counsel cannot establish the required evidentiary showings under *Wright Line*, 251 NLRB 1083 (1980), *end. on other grounds* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983), *Wright Line*.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

XXIV. The Complaint should be dismissed as it does not effectuate the purposes and policies of the NLRA and there is no remedy for the alleged actions alleged in the Complaint.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

XXV. The Complaint is barred by Section 10(b) of the NLRA, as the charges that are the basis of the Complaint are outside the six-month limitations period.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE

XXVI. The Respondent did not violate the NLRA by unilaterally changing employees' terms and conditions of employment.

XXVII. The Union does not represent a majority of the employees in the unit.

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE

XXVIII. The proposed Unit set forth in the Complaint as an “appropriate bargaining unit” is not an appropriate bargaining unit and therefore the Respondent has not violated the Act.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE

XXIX. The Complaint should be dismissed based on the doctrines of Res Judicata and Collateral Estoppel pursuant to the Opinion and Award of United States District Judge Nelson S. Roman in Paul J. Murphy, et.al. v. Allways East Transportation, Inc., 14-CV-8570 (NSR) (U.S.D.C. So. Dist. December 1, 2014), and Judgment dated December 2, 2014 annexed hereto as Exhibit “A”.

WHEREFORE, for all of the reasons set forth above, Respondent respectfully demands that the Complaint, and each and every part thereof, be dismissed in its entirety.

Dated: Lake Success, NY

December 8, 2014

MARSHALL M. MILLER ASSOCIATES, INC.

/s/

Richard I. Milman, Esq.
Ira D. Wincott, Esq.
Attorneys for Respondent
3000 Marcus Avenue, Suite 3W8
Lake Success, New York 11042
(516) 328-8899
(516) 328-0082

CERTIFICATE OF SERVICE

I, Ira D. Wincott, hereby certify that the Amended Answer in Case Nos. 03-CA-128669 and 03-CA-133846 have been served this day by E-Filing and Certified or Regular Mail, as follows:

Rhonda Ley, Regional Director
National Labor Relations Board – Region 3
130 S. Elmwood Avenue
Buffalo, NY 14202-2387

E-Filing

John Grunert, Esq.
National Labor Relations Board – Region 3
11A Clinton Avenue
Albany, NY 12207

E-Filing and E-Mail

Lori Polesel, Business Agent
International Brotherhood of Teamsters
Local 445
15 Stone Castle Rd.
Rock Tavern, NY 12575-5000

**Certified Mail,
Return Receipt Requested**

Daniel E. Clifton, Esq.
Lewis, Clifton & Nikolaidis, P.C.
350 Seventh Avenue, 18th Floor
New York, NY 10001-5013

E-Mail



IRA D. WINCOTT

Dated: December 8, 2014

EXHIBIT “A”

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
PAUL J. MURPHY, Acting Regional Director of
the Third Region of the National Labor Relations
Board, for and on behalf of the NATIONAL
LABOR RELATIONS BOARD,

Petitioner,

14 CIVIL 8570 (NSR)

-against-

JUDGMENT

ALL WAYS EAST TRANSPORTATION, INC.,

Respondent.
-----X

Petitioner having filed a petition for Injunction Under Section 10(j) of the National Labor Relations Act, and the action having come before the Honorable Nelson S. Roman, United States District Judge, and the Court, on December 1, 2014, having issued an Opinion and Order denying the Regional Director's petition for temporary injunctive relief under § 10(j) of the Act, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order, dated December 1, 2014, the Regional Director's petition for temporary injunctive relief under § 10(j) of the Act is Denied; accordingly, the case is closed.

Dated: White Plains, New York
December 2, 2014


CLERK

RUBY J. KRAJICK
Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X		
PAUL J. MURPHY, Acting Regional Director of	:	
the Third Region of the National Labor Relations	:	
Board, for and on behalf of the	:	
NATIONAL LABOR RELATIONS BOARD,	:	
	:	
Petitioner,	:	14-cv-8570 (NSR)
-against-	:	OPINION & ORDER
	:	
ALLWAYS EAST TRANSPORTATION, INC.,	:	
	:	
Respondent.	:	
----- X		

NELSON S. ROMÁN, United States District Judge

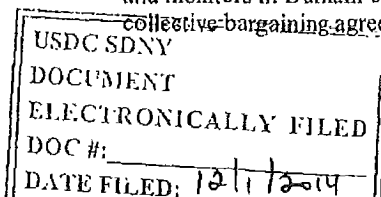
Paul J. Murphy (the "Regional Director" or "Petitioner"), Acting Regional Director for the Third Region of the National Labor Relations Board (the "Board") petitions this Court for temporary injunctive relief pursuant to § 10(j) of the National Labor Relations Act (the "Act"). 29 U.S.C. § 160(j). For the following reasons, the Regional Director's petition is DENIED.

BACKGROUND

In February 2014, Respondent Allways East Transportation, Inc. contracted with Dutchess County, New York to transport preschool and special education students formerly transported by nonparty Durham School Services ("Durham"). (Pet. at 4, ECF No. 1.) Durham is a national bus company whose bus drivers and matrons¹ are represented by the International Brotherhood of Teamsters, Local 445 (the "Union").² (Pet'r's Mem. at 5, ECF No. 3.)

¹ Respondent uses the word "matrons" to describe employees who supervise students on a bus. Durham uses the word "monitors."

² After a Board election, the Union was certified on October 28, 2009 as the bargaining representative of all drivers and monitors in Durham's facilities in Red Hook, New York, and Poughkeepsie, New York. The applicable collective bargaining agreement expires in August 2018.



Respondent is a small bus company specializing in preschool and special education transportation, which has never had union employees. (Pet. Ex. C. at 1-2, ECF No. 1.)

To handle the new routes, Respondent began hiring bus drivers and matrons, many of whom previously worked for Durham. (Pet'r's Mem. at 6, ECF No. 3.) Respondent also opened a new terminal in Wappingers Falls, New York for the Dutchess County routes.³ (*Id.* at 7.) By April 22, 2014, the date on which Respondent began servicing the Dutchess County routes, Respondent had hired roughly 60⁴ former Durham employees and assigned them to the new facility in Wappingers Falls. (*Id.* at 6.) As of that date, former Durham employees made up a majority of the drivers and matrons at Wappingers Falls.⁵ (*Id.*) Excluding Wappingers Falls, Respondent also employs approximately 200 additional drivers and matrons based out of Durham's main facility in Yonkers, New York. (*Id.* at 7.)

No card check or Board election has been conducted since Respondent contracted with Dutchess County. On March 10, 2014, the Union called and emailed Marlaina Koller, Respondent's Vice President, to schedule a meeting. (*Id.* at 6.) On April 16, 2014, the Union sent a letter to Ms. Koller formally requesting that Respondent recognize and collectively bargain with the Union as the representative of drivers and matrons who service the Dutchess County routes. (*Id.*) Then on May 14, 2014, a Union representative visited Respondent's Wappingers Falls facility to speak with Ms. Koller, but she was not at the facility. (Pet. Ex. F at 2-3, ECF No. 1.) To date, Respondent has not recognized or bargained with the Union.

³ Respondent serviced a route for students of the New York School for the Deaf from the Wappingers Falls facility in addition to the Dutchess County routes. (Pet. at 6-7, ECF No. 1.)

⁴ Estimates in the record range from 58 to 60.

⁵ The estimates in the record of this proportion range from 60% to 90%, but, as explained below, all that is relevant is that the proportion is greater than 50%.

The Union filed charges with the NLRB on May 15 and August 1, 2014 for unfair labor practices. (Pet. at 2, ECF No. 1.) A hearing on the consolidated charges is scheduled for December 15, 2014 before an NLRB Administrative Law Judge. (Letter from Ira D. Wincott to Judge Román at 1, Oct. 30, 2014, ECF No. 10.) The Regional Director now petitions under § 10(j) of the Act for temporary injunctive relief, pending the Board's final decision, directing Respondent to recognize and bargain with the Union, to post the Court's order at Respondent's Wappingers Falls facility, and to file an affidavit setting forth the manner of Respondent's compliance with the Court's order. (*See* Pet. at 6-8, ECF No. 1.)

STANDARD OF REVIEW

In assessing a § 10(j) petition, a district court applies a two-prong test: (1) the court must find "reasonable cause" to believe that unfair labor practices have been committed, and (2) the court must find that the requested relief is "just and proper." *Hoffman ex rel. N.L.R.B. v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 364-65 (2d Cir. 2001).

The reasonable cause standard is considerably deferential to the Regional Director. "With respect to issues of fact, the Regional Director should be given the benefit of the doubt . . . and on questions of law, the Board's view should be sustained unless the court is convinced that it is wrong." *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1051 (2d Cir. 1980) (internal quotation omitted); *see also Kaynard v. Mego Corp.*, 633 F.2d 1026, 1031 (2d Cir. 1980) (holding that the court should sustain the Regional Director's factual assertions if they are "within the range of rationality"). A petitioner must, notwithstanding, come forward with "evidence sufficient to spell out a likelihood of [a] violation." *Mattina v. Chinatown Carting Corp.*, 290 F. Supp. 2d 386, 391 (S.D.N.Y. 2003) (quoting *Danielson v. Joint Bd. of Coat, Suit & Allied Garment Workers' Union*, 494 F.2d 1230, 1234 (2d Cir. 1974)).

DISCUSSION

Section 8(a)(5) of the Act makes it unlawful for an employer to “refuse to bargain collectively with the representatives of [its] employees.” 29 U.S.C. § 158(a)(5). Where a union’s representation was established under a previous employer, the duty to bargain extends to a “legal successor.” *In re Dattco, Inc.*, 338 NLRB 49, 49 (2002) (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 36-41 (1987)). Because Respondent does not dispute that it has failed to bargain with the Union, the reasonable cause inquiry turns on whether Respondent is a legal successor. Respondent is a legal successor only if (1) there is “substantial continuity” of operations and (2) a majority of “an appropriate bargaining unit” are the predecessor’s employees at a time when the alleged successor has reached a “substantial and representative complement.” *Fall River Dyeing*, 482 U.S. at 36-41.

Petitioner contends that the Wappingers Falls facility is an appropriate bargaining unit. Respondent contends that Wappingers Falls must be considered together with the Yonkers facility. A single-facility bargaining unit is presumptively appropriate unless it has been “so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity.” *Dattco*, 338 NLRB at 50. In assessing whether the presumption has been overcome, a court considers such factors as “central control over daily operations and labor relations, including the extent of local autonomy; degree of employee interchange; similarity of skills, functions, and working conditions; and bargaining history, if any.” *Id.*; accord *Dean Transp., Inc.*, 350 NLRB 48, 58 (2007), *enf’d*, 551 F.3d 1055 (D.C. Cir. 2009). As explained below, (i) on this record and in light of *Dattco*, the Court is constrained to find that there is no reasonable cause to believe that the Wappingers Falls facility is an appropriate unit, and (ii) as a result, Respondent has not violated the Act.

Under facts similar to the instant case, the Board in *Dattco* concluded that a single facility was not an appropriate bargaining unit. 338 NLRB at 50. In that case, the Board noted that bus drivers across facilities possessed the same skills and certifications and performed the same job duties under the same working conditions. *Id.* at 50-51. A substantial number of drivers were shuttled from their base facility to other facilities, daily, as the need arose. *Id.* at 50. Finally, control was largely centralized at the respondent's headquarters. This included hiring, firing, formulating policies and procedures, setting wages and benefits, and carrying out labor relations, payroll, accounting, and records functions. *Id.* at 50-51. Trainings and seminars were conducted at headquarters, and vehicle repair and maintenance for all nine facilities was centralized at two of those facilities. *Id.* Negotiating contracts with clients, formulating routes, and assigning drivers to those routes were all carried out centrally. *Id.* The most senior employee at the facility at issue was a dispatcher who performed some supervision but possessed limited authority. The dispatcher would, for example, explain local rules to drivers, direct drivers where to park busses, issue employees verbal warnings for lateness and tardiness, and communicate with headquarters concerning the resources needed for each shift. *Id.* at 50.

Here, drivers and matrons in Wappingers Falls perform the same job duties as those in Yonkers and possess roughly identical skills, certifications, and training. Both facilities provide preschool and special education transportation services.

There is also some interchange of employees between facilities. Throughout the spring and summer of 2014, Respondent shuttled as many as ten employees from the Yonkers facility to Wappingers Falls for the day, at least a few times each week.⁶ (Pet'r's Mem. at 13, ECF No. 3.) Additionally, seven nonmanagement employees from Yonkers have permanently transferred to

⁶ While this degree of interchange may not be continuing through the start of the 2014-2015 school term, it still bears on the degree to which the facilities are integrated.

the Wappingers Falls facility. (Pet. Ex. C at 5, ECF No. 1.) Respondent anticipates being able to shuttle Wappingers Falls employees to Yonkers as the need arises. (*Id.*) While the degree of interchange in *Dattco* was perhaps greater, the interchange here is not so limited as to alter the conclusion that the single-facility presumption has been rebutted. *See, e.g., Waste Mgmt. of Wash., Inc.*, 331 NLRB 309, 309, 311 (2000) (noting that four or five instances of employee interchange per week was “minimal” but did not alter the conclusion that the single-facility presumption had been rebutted).

Also as in *Dattco*, supervision and control over Respondent’s daily operations is largely centralized, with limited autonomy at the facility level. Respondent’s management team—President Judith Koller, Vice President Marlaina Koller, and Operations Manager Elida Wulczyn—has authority over both facilities.⁷ (Pet. Ex. C at 4, ECF No. 1.) Petitioner does not dispute that decisions regarding policies, procedures, hiring, firing, discipline, wages and benefits are made centrally. Accounting and payroll for both facilities are housed in Yonkers. (*Id.* at 5.) Vehicle repair and maintenance for both facilities is performed in Yonkers (although Respondent intends to open a repair shop in Dutchess County). (*Id.* at 4.) Wappingers Falls has two local dispatchers who perform, in some sense, a supervisory role; however, as in *Dattco*, the local dispatchers’ authority is limited. (Pet. Exs. D-E, ECF No. 1.) Dispatchers arrange for coverage in the event of a bus accident, report late or tardy students to schools and parents as necessary, and deal with other issues as they arise. (*Id.*) But if they feel they cannot address an issue, the dispatchers elevate the issue to Ms. Wulczyn, who has an office in Yonkers. (*Id.*; Pet. Ex. C at 4, ECF No. 1.) The dispatchers lack the authority to make hiring, firing, or disciplinary decisions; rather, the evidence Petitioner has presented indicates that the dispatchers convey

⁷ Even if Judith Koller spends most or all of her time in Wappingers Falls, Petitioner does not dispute that she is the President of the company and wields authority over both facilities.

decisions that are made by the Kollers and Ms. Wulczyn. (Pet. Exs. D-E, ECF No. 1.) For example, the dispatchers convey route assignments to drivers and matrons, but those assignments are determined centrally. (*Id.*) Accordingly, the degree of integration across facilities and limited local autonomy at Respondent is akin to that in *Dattco*. The dispatchers' somewhat supervisory role does not alter this conclusion. See *Dattco* 338 NLRB at 50 ("The managers or dispatchers at the receiving terminals supervise the drivers sent to them.").

Finally, while there is no history of collective bargaining at Respondent, the newly hired drivers and matrons were part of a multi-facility bargaining unit while at Durham.⁸ (See Pet. at 3-4, ECF No. 1.) This further weighs against the single-facility presumption (and is a factor that was not present in *Dattco*).

This case is distinguishable from *Dean Transportation*, in which the respondent failed to rebut the single-facility presumption. 350 NLRB at 48. In *Dean Transportation*, there was significantly more local autonomy at each facility, "virtually no" employee interchange, and less uniformity of job skills and working conditions across facilities. The facility at issue had its own mechanics, its own route planners, and two on-site supervisors and an assistant supervisor who oversaw dispatchers, drivers, and route planners. *Id.* at 51-52. These supervisors did not exercise authority over any other facilities. *Id.* Additionally, there had been only two instances of temporary employee interchange among drivers (at a facility of 137 drivers). *Id.* at 57. Moreover, the facility at issue was the only one that employed a substantial number of general education drivers in addition to special education drivers. *Id.* at 59. Finally, the respondent even

⁸ Petitioner characterizes Durham's bargaining history as "single location bargaining." While a district court deciding a § 10(j) petition should credit the petitioner's factual inferences that are "within the range of rationality," *Kaynard*, 633 F.2d at 1031, this one is not. Petitioner's own statement of the bargaining unit at Dunham describes one unit with *two* locations—one in Poughkeepsie, New York and one in Red Hook, New York. (Pet. at 3-4, ECF No. 1 ("All full-time and regular part-time drivers and monitors employed by the Employer at its 10-14 Tucker Drive, Poughkeepsie, New York and Middle Road, Red Hook, New York locations").)

treated the facility as a separate unit for labor-related purposes including seniority, job bidding, and the grievance process. *Id.* at 55, 59. As a result, *Dean Transportation* is inapposite.

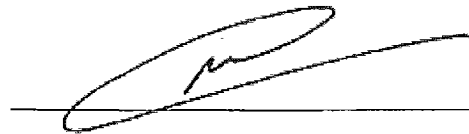
As of April 22, 2014,⁹ out of more than 260 drivers and matrons across both facilities, roughly 60 were former Durham employees. Because Wappingers Falls must be considered together with the Yonkers facility, former Durham employees do not constitute a majority of the bargaining unit, defeating legal successorship. As a result, there is no reasonable cause to believe that Respondent had a duty to bargain with the Union, and its refusal to do so did not violate the Act.

CONCLUSION

For the foregoing reasons, the Court DENIES the Regional Director's petition for temporary injunctive relief under § 10(j) of the Act. The Court respectfully directs the Clerk to close this case.

Dated: December 1ST, 2014
White Plains, New York

SO ORDERED:

A handwritten signature in black ink, appearing to read 'Nelson S. Román', is written over a horizontal line.

NELSON S. ROMÁN
United States District Judge

⁹ There is no dispute between the parties over the date on which the composition of the workforce should be evaluated.

EXHIBIT 3

MILMAN LABUDA LAW GROUP PLLC

3000 MARCUS AVENUE
SUITE 3W8
LAKE SUCCESS, NEW YORK 11042

TELEPHONE (516) 328-8899
FACSIMILE (516) 328-0082

Author: Ira D. Wincott
Direct E-Mail Address: ira@mlaborlaw.com
Direct Dial: (516) 303-1362

December 1, 2014

Via Overnight Mail &
Via Fax: (914) 965-6774

Durham School Services
a/k/a Durham National Express
a/k/a A&E Transportation Services, Inc.
10-14 Tucker Drive
Poughkeepsie, New York 12603

Attn: Custodian of Records

Re: Allways East Transportation, Inc.
NLRB Case Nos. 03-CA-128669 and 03-CA-133846

Dear Sir or Madam:


Please be advised that this office represents the Respondent, Allways East Transportation, Inc., with regard to the above matter which is scheduled for trial on December 15, 2014, at the Poughkeepsie Municipal Building, 62 Civic Center Plaza, Common Council Chambers (3rd Floor), Poughkeepsie, New York 12601.

Enclosed please find a Subpoena Duces Tecum that is being served on you requiring the production of certain items in connection with the above-mentioned hearing, along with the appropriate witness fee. Please see to it that the items subpoenaed are present at the specified date and time. However, in order to prevent unnecessary delay at trial before the Administrative Law Judge, we propose that we meet before trial to review the items requested by the Subpoena Duces Tecum and/or that you provide copies of the items prior to trial.

I thank you in advance for your anticipated courtesy and cooperation.

Very truly yours,

MILMAN LABUDA LAW GROUP PLLC



Ira D. Wincott

IDW:SF

cc: Richard I. Milman, Esq.
Jonathan Sturm, Esq.

1

From: (516) 328-8899
Ira D. Winick
Mann Labuda Law Group PLLC
3000 Marcus Avenue, Ste. 2WB
Lyle Success, NY 11042

Origin ID: ELZA



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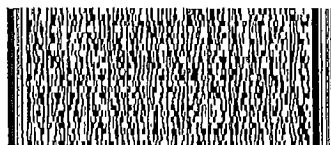
Ref #: Always East
Invoice #
PO #
Dept #

SHIP TO: (516) 328-3137
Custodian of Records
Durham School Services
aka Durham National Express
10-14 Tucker Drive
POUGHKEEPSIE, NY 12603

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7 27 pm	Picked up	GARDEN CITY NY
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Total pieces	1	Total shipment weight	0 5 lbs / 0 23 kgs
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Special handling section	Deliver Weekday		



December 3, 2014

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Service type:	FedEx Standard Overnight	Delivery date:	Dec 2, 2014 14:03
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		Weight:	0.5 lbs/0.2 kg

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POUGHKEEPSIE, NY US

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Reference

Allways East

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MILMAN LABUDA LAW GROUP PLLC

8000 MARCUS AVENUE
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LAKE SUCCESS, NEW YORK 11042

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FACSIMILE (516) 328-0082

Author: Ira D. Wincott
Direct E-Mail Address: ira@mllaborlaw.com
Direct Dial: (516) 303-1362

December 1, 2014

Via Overnight Mail &
Via Fax: (914) 965-6774

Durham School Services
a/k/a Durham National Express
a/k/a A&E Transportation Services, Inc.
10-14 Tucker Drive
Poughkeepsie, New York 12603

Attn: Custodian of Records

Re: Allways East Transportation, Inc.
NLRB Case Nos. 03-CA-128669 and 03-CA-133846

Dear Sir or Madam:


Please be advised that this office represents the Respondent, Allways East Transportation, Inc., with regard to the above matter which is scheduled for trial on December 15, 2014, at the Poughkeepsie Municipal Building, 62 Civic Center Plaza, Common Council Chambers (3rd Floor), Poughkeepsie, New York 12601.

Enclosed please find a Subpoena Duces Tecum that is being served on you requiring the production of certain items in connection with the above-mentioned hearing, along with the appropriate witness fee. Please see to it that the items subpoenaed are present at the specified

63

**MARSHALL M. MILLER
ASSOCIATES, INC.**
3000 MARCUS AVENUE - SUITE 3W8
LAKE SUCCESS, NEW YORK 11042

THE FIRST NATIONAL
BANK OF LONG ISLAND
LAKE SUCCESS, NEW YORK 11042
50-1133-214

 Checkmark® Check Fraud
Protection for Business

December 1, 2014

PAY TO THE
ORDER OF

Durham School Services

\$ 40.00

Forty 00/00-----

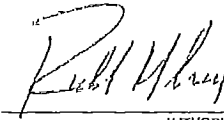
DOLLAR

Durham School Services

Allways East

MEMO





AUTHORIZED SIGNATURE

⑈006391⑈ ⑈021411335⑈ ⑈087006565⑈

MARSHALL M. MILLER ASSOCIATES, INC.

639

December 1, 2014

Durham School Services

40.00

Forty 00/00-----

Durham School Services

Allways East

FORM NLRB-31
(12-12)

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARDTo Custodian of Records - Durham School Services, aka Durham/National Express
aka A&E Transportation Services, Inc., 10-14 Tucker Drive, Poughkeepsie, N.Y.As requested by Milman Lebeda-Lewis Group PLLC, Counsel to Respondent, Always East ¹²⁶⁰³whose address is 3000 Marcus Ave., Lake Success NY 11042
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Administrative Law Judge

_____ of the National Labor Relations Board

at Poughkeepsie Municipal Bldg., 62 Civic Center Plaza, Common Council Chambers
In the City of Poughkeepsie, N.Y. (3rd Fl.)on the 15th day of December 20 14 at 1:00 (a.m.) (p.m.) or any adjourned

Always East Transportation, Inc.

or rescheduled date to testify in _____

03-CA-128669, 03-CA-133846

(Case Name and Number)

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

See Attachment and Rider

In accordance with the Board's Rules and Regulations, 29 C.F.R. Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings), objections to the subpoena must be made by a petition to revoke and must be filed as set forth therein. Petitions to revoke must be received within five days of your having received the subpoena. 29 C.F.R. Section 102.111(b) (3). Failure to follow these regulations may result in the loss of any ability to raise such objections in court.

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

B - 720475

Issued at Albany, NY

this 24th day of October

2014



Chairman, National Labor Relations Board

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

RIDER

Subpoena Duces Tecum No. B-720475
Re: Allways East Transportation
Case Nos.: 03-CA-128669 and 03-CA-133846

DEFINITIONS AND INSTRUCTIONS

1. The word "document" or "documents" means, without limitation, the following items, whether printed or recorded or reproduced by any other mechanical process, or written or produced by hand, or any existing printed, typewritten, handwritten or otherwise recorded material of whatever kind and/or character, including, but not limited to: agreements, communications, correspondence, telegrams, mailgrams, letters, memoranda, facsimile transmissions, minutes, notes of any character, notes of meetings, diaries, calendars, statements, affidavits, charts, reports, photographs, microfilm or microfiche, audio and/or video tapes, statistics, pamphlets, newsletters, press releases, bulletins, transcripts, summaries, telephone bills, notes or records memorializing or regarding telephone conversations, notes, summaries or records memorializing or relating to personal conversations, meetings, interviews or conferences, transcripts or summaries or reports of investigations and/or negotiations, drafts, internal or inter-office memoranda or correspondence, lists, personnel documents, employment applications, payroll records, time cards, time and attendance records, flyers, leaflets, texts of speeches, books, records, tax records, bookkeeping and/or accounting work papers, canceled checks, accounts, account receivable records, ledgers, journals, purchase orders, invoices, bills of lading, billing slips, delivery records, receiving records, data contained in computers, computer printouts, computer discs and/or files and electronic mail and all data contained therein, including material stored on hard drives that may be retrieved, any marginal or "post-it" or "sticky pad" comments appearing on or with documents, and all other writings, figures or symbols of any kind, including but not limited to carbon, photographic or other duplicative copies of any such material in the possession of, control of or available to the subpoenaed party, or any agent, representative, or other persons acting in cooperation with, in concert with, or on behalf of said subpoenaed party.
2. The word "person" or "persons" means natural persons, corporation(s), partnership(s), sole proprietor(s), association(s) or any other kind of entity.
3. "Respondent" refers to Allways East Transportation, Inc.
4. International Brotherhood of Teamsters, Local 445 will be referred to as "the Union".
5. Durham/National Express a/k/a A&E Transportation Services, Inc. a/k/a Durham School Services will be referred to as "Durham" and unless otherwise indicated, refers to the Poughkeepsie and Rhinebeck/Red Hook facilities.

6. Unless otherwise stated, each item requested in this subpoena covers the period from September 8, 2009 until present.
7. Whenever used in this subpoena, the singular shall be deemed to include the plural, and vice versa; the present tense shall be deemed to include the past tense, and vice versa; the masculine shall be deemed to include the feminine, and vice versa; the disjunctive "or" shall be deemed to include the conjunctive "and," vice versa; and the words "each", "every", "any", and "all" shall be deemed to include each of the other words.
8. References to the parties shall be deemed to include any and all of their officers, agents and representatives.
9. This subpoena applies to documents in the possession, custody or control of the Union, as well as your present or former agents, attorneys, accountants, advisors, investigators, and any other persons or companies directly or indirectly employed by or connected with you.
10. As to any documents not produced in compliance with this subpoena on any ground or if any document requested was, through inadvertence or otherwise, destroyed or is no longer in your possession, please state:
 - a. the author;
 - b. the recipient;
 - c. the name of each person to whom the original or a copy was sent; .
 - d. the date of the document;
 - e. the subject matter of the document; and
 - f. the circumstances under which the document was destroyed, withheld or is no longer in your possession.
11. This request is continuing in character and if additional responsive documents come to your attention following the date of production, such documents must be promptly produced.
12. This request seeks production of all documents described, including all drafts and non-identical or distribution copies.
13. This request seeks production of responsive documents in their entirety, without abbreviation, redaction, deletion or expurgation.
14. When used in this subpoena, the term "documents regarding" means all documents that, in whole or in part, discuss, describe, mention, pertain to, reflect, refer to or relate to the subpoenaed item.
15. All documents produced pursuant to this subpoena are to be organized according to the subpoena paragraph to which the document(s) are responsive. Labels referring to that subpoena paragraph are to be affixed to each document or set of documents.

ATTACHMENT TO SUBPOENA (Durham)

1. All Collective Bargaining Agreements between the Union and Durham from September 8, 2009 to the present.
2. All dues invoices submitted by the Union to Durham from September 8, 2009 to the present.
3. All documents (including, but not limited to, memos, notes, ledgers, letters, e-mails, text messages, instant messages, lists, correspondence, records and memorializations of conversations) received by Durham evidencing an employee's Beck Objector request/status from September 8, 2009 to present and Durham's response, if any.
4. All documents, e-mails, letters and correspondence, including Petitions received by Durham from Durham employees advising Durham and/or the Union that Durham employees no longer want the Union to be their bargaining representative or requesting the Union to disclaim interest or requesting that the Union be decertified, received from September 8, 2009 to the present.
5. Copies of charges filed by Durham, charges filed against Durham by the Union, Petitions filed by the Union or employees and Decertification Petitions filed against the Union including, but not limited to NLRB Case Nos. 03-RC-11921, 03-RD-1588, 03-CA-028013, 03-CA-028065, 03-RD-1593, 03-RD-106543, including copies of all correspondence, Position Statements and documents provided to NLRB, including Affidavits given and received, with the exception of those communications covered by attorney/client privilege, from September 8, 2009 to the present.
6. All Employee Handbooks from September 8, 2009 to the present.
7. A list of all employees at Durham's Poughkeepsie facility employed from June 5, 2013 to April 22, 2014, with date of hire, job title and date of termination, if applicable.
8. A list of all employees at Durham's Rhinebeck/Red Hook facility employed from June 5, 2013 to April 22, 2014, with date of hire, job title and date of termination, if applicable.
9. All payroll records for employees at Durham's Poughkeepsie facility employed from June 5, 2013 to April 22, 2014.
10. All payroll records for employees at Durham's Rhinebeck/Red Hook facility employed from June 5, 2013 to April 22, 2014.
11. All invoices, remittance reports, audits, audit findings, notices, correspondence and memoranda received from the Union's affiliated Funds, submitted by the affiliated Funds to Durham from September 8, 2009 to the present and all of Durham's responses to same.
12. A list of all customers/clients of Durham for the Poughkeepsie and Rhinebeck/Red Hook facility from January 1, 2014 to the present and type of services performed.
13. A copy of the bid submitted by Durham to Dutchess County and the resulting contract between Durham and Dutchess County for work to be performed commencing 2012 and any and all extensions.

14. All documents (including, but not limited to, memos, notes, ledgers, letters, e-mails, text messages, instant messages, lists, correspondence, records and memorializations of conversations) received by Durham and sent by Durham referring to, addressing, discussing and notifying Durham of the disqualification, removal, cancellation and/or discontinuance of Durham's contract with the County of Dutchess on or about February 2014 to April 2014 received from or sent to the County of Dutchess, parents, employees, Union, vendors, supplies, parent companies or subsidiaries, affiliates, shareholders, owners, management, directors, officers and agents.

15. All documents (including but not limited to memos, notes, ledgers, letters, e-mails, lists, correspondence, records and memorializations of conversations) that contain information concerning the meeting held on March 11, 2014 by Durham with Durham employees regarding the loss of Dutchess County work, including documents referring to the March 11, 2014 meeting.

16. All recordings (digital, analog, still, video or audio) created on March 11, 2014 at the meeting held between Durham and its employees concerning the loss of Dutchess County work.

17. Copies of all documents regarding route assignments, including route sheets for all drivers and monitors (matrons) employed at Durham's Poughkeepsie facility from January 1, 2014 to June 1, 2014.

18. Copies of all documents regarding route assignments, including route sheets for all drivers and monitors (matrons) employed at Durham's Rhinebeck/Red Hook facility from January 1, 2014 to June 1, 2014.

EXHIBIT 4

MILMAN LABUDA LAW GROUP PLLC
3000 MARCUS AVENUE
SUITE 3W8
LAKE SUCCESS, NEW YORK 11042

TELEPHONE (516) 328-8899
FACSIMILE (516) 328-0082

Author: Ira D. Wincott
Direct E-Mail Address: ira@mllaborlaw.com
Direct Dial: (516) 303-1362

December 16, 2014

Via E-Mail: John.Grunert@nlrb.gov

John Grunert, Esq.
National Labor Relations Board
Region 3
11A Clinton Avenue
Albany, New York 12207

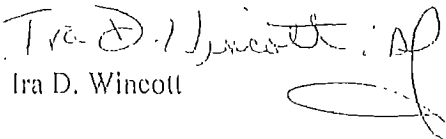
Re: Allways East Transportation
03-CA-128669 & 03-CA-133846

Dear Mr. Grunert:

Pursuant to ALJ Flynn's instructions and in furtherance of our enforcement of subpoena application under Section 102.31(d) of the Board's Rules as set forth on the record of the proceedings in the above matter on December 15 and 16, 2014, this correspondence shall serve as the Respondent's written request that General Counsel institute enforcement proceedings in the District Court for the Southern District of New York, regarding subpoena number B-720475, as marked into the record of the proceedings in this matter as Respondent's Exhibit 1.

Very truly yours,

MILMAN LABUDA LAW GROUP PLLC


Ira D. Wincott

IDW:SF

cc: ALJ Susan Flynn
Richard Milman, Esq.
Jonathan Sturm, Esq.

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**NATIONAL LABOR RELATIONS BOARD, ON BEHALF
OF ALLWAYS EAST TRANSPORTATION, INC.**

Applicant

vs.

**CIVIL NO. __-CV-_____
J. _____
ECF CASE**

**NATIONAL EXPRESS CORP., d/b/a DURHAM
SCHOOL SERVICES**

Respondent

To: Richard I. Milman, Esq.
Milman Labuda Law Group PLLC
3000 Marcus Avenue, Suite 3W8
Lake Success, New York 11042
Attorney for Relator
Allways East Transportation, Inc.

**NOTICE OF INSTITUTION OF PROCEEDING TO
ENFORCE SUBPOENA DUCES TECUM**

Please take notice that the General Counsel of the National Labor Relations Board, in the name of the Board, but on behalf of Allways East Transportation, Inc., ("Allways East"), has petitioned the Court for an order enforcing a subpoena duces tecum issued by the Board at the request of Allways East. Attached are copies of the order to show cause and the application for order enforcing subpoena duces tecum, filed with the court on January 26th, 2015.


This proceeding has been instituted at Allways East's request pursuant to the provisions of Section 11(2) of the National Labor Relations Act, as amended (29 U.S.C. 161(2)), and of Section 102.31(d) of the Rules and Regulations, Series 8, as amended, of the National Labor Relations Board (29 C.F.R. 102.31(d)). We specifically call Allways East's attention to that

portion of Section 102.31(d) of the Rules and Regulations that provides that by bringing this proceeding “neither the General Counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the Court.”

DATED at Albany, New York this 26th day of January, 2015.

National Labor Relations Board

By: Richard F. Griffin, Jr., General Counsel
Mary E. Mattimore, Regional Attorney


JOHN J. GRUNERT, Counsel for Applicant
National Labor Relations Board – Region 3
Albany Resident Office
Leo W. O’Brien Federal Building
11A Clinton Avenue, Room 342
Albany, New York 12207
(518) 431-4159
SDNY Bar Code: JG1004

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**NATIONAL LABOR RELATIONS BOARD, ON BEHALF
OF ALLWAYS EAST TRANSPORTATION, INC.**

Applicant

vs.

CIVIL NO. __-CV-_____
J. _____
ECF CASE

**NATIONAL EXPRESS CORP., d/b/a DURHAM
SCHOOL SERVICES**

Respondent

CERTIFICATE OF SERVICE

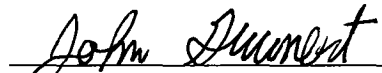
I hereby certify that on January 26th, 2015, I filed the following documents by overnight mail with the Clerk of the U.S. District Court, SDNY:

- Civil Cover Sheet
- Application for Order Enforcing Administrative Subpoena Duces Tecum
- Order to Show Cause (Proposed)
- Notice of Institution of Proceedings to Enforce Subpoena Duces Tecum
- Certificate of Service

I hereby certify that I have sent the foregoing, and the SDNY Electronic Case Filing Rules & Instructions, by overnight mail to the following:

Richard I. Milman, Esq.
Marshall M. Miller Associates, Inc.
3000 Marcus Avenue, Suite 3W8
Lake Success, NY 11042

Charles Roberts, Esq.
Constangy, Brooks & Smith, LLP
100 North Cherry Street, Suite 300
Winston-Salem, NC 27101



JOHN J. GRUNERT, Attorney for Applicant
National Labor Relations Board
Third Region – Resident Office
Leo W. O'Brien Federal Building
11A Clinton Avenue, Room 342
Albany, New York 12207-2350
Telephone: (518) 431-4159
Facsimile: (518) 431-4157
Email: John.Grunert@NLRB.gov
SDNY Bar Code: JG1004